

O N A P P E A L
FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N :

MR. & MRS. BENJAMIN PATRICK Appellants

- and -

1. BEVERLEY GARDENS DEVELOPMENT
COMPANY LIMITED Respondents

B E T W E E N :

10 MR. & MRS. BENJAMIN PATRICK Appellants

- and -

1. BEVERLEY GARDENS DEVELOPMENT
COMPANY LIMITED

2. XDOL MIGNOTT Respondents

CASE FOR THE RESPONDENTS

RECORD

20 1. These are Consolidated Appeals from Judgments and Orders of the Court of Appeal of Jamaica brought pursuant to the Order of that Court dated the 30th day of May, 1975, granting the Appellant leave to appeal to Her Majesty in Council. p.161

2. In Appeal 36 of 1972 the Court of Appeal of Jamaica dismissed the Appellants' Appeal against the Judgment and Order of Mr. Justice Chambers dated the 16th day of November, 1972. p.85

3. In Appeal 21 of 1974 the Court of Appeal of Jamaica dismissed the Appellants' Appeal against the Judgment and Order of Mr. Justice Vanderpump dated the 24th day of May, 1974. p.121

RECORDAPPEAL 36 of 1972

4. The action in respect of this Appeal was brought by the first Respondent as Plaintiff in the Supreme Court of Judicature of Jamaica against the Appellants as Defendants on the 23rd day of March, 1972 for the following relief :-

- p.1. (a) The possession of all that piece or parcel of land part of May Pen in the parish of Clarendon comprising by survey 5 acres 1 rood and 6 perches and butting and bounding and being of the shape as appears by the Plan thereof and being the land comprised in Certificate of Title registered at Volume 30 Folio 58 of the Register Book of Titles and now known as No. 15 Sunnyside Avenue, May Pen in the parish of Clarendon. 10
- (b) An injunction restraining the Defendants by themselves or their tenants or agents or otherwise from erecting or causing or permitting to be erected on the said land any further buildings of any type whatsoever. 20
- (c) A Mandatory Order that the Defendants do forthwith pull down, dismantle and demolish building already erected on the said land.
- p.1. 5. By Summons dated the 23rd day of March, 1972, the Respondent sought an interlocutory injunction that the Defendants by themselves, their servants or agents and each and every one of them be restrained from erecting or causing or permitting to be erected on the said land any further building of any type thereof. 30
- p.3. 6. In support of this Summons, was the affidavit evidence of Charles Wells McDonald dated the 22nd day of March, 1972.
- p.9. 7. (i) Upon the hearing of the said Summons on the 26th day of April, 1972, the Court ordered that pursuant to Section 236 of Cap. 177 that the question whether the ownership of the land claimed by the Plaintiff is res-judicata as between the Plaintiff and Defendants or as between the Plaintiff's predecessor in 40

title and the Defendants, be set down for hearing and the meantime the hearing of this Summons on the merits be stayed.

- 10 (ii) Defendants restrained by themselves or their agents from carrying on any further building on the land until May 29th 1972 or on oral undertaking being given by Mr. W.K. Chin See, Attorney-at-Law for Plaintiff to pay any loss or damage sustained by the Defendants if the Plaintiff should fail to prove the issue herein being reserved.

8. The preliminary issue was heard by Mr. Justice Chambers on the 13th day of October and the 13th, 14th, 15th and 16th days of November, 1972 inclusive, when there was judgment for the Plaintiff and the Court ordered :-

p.84.

- 20 (a) Possession of the said land.
- (b) An Injunction is hereby granted restraining the Defendant from constructing any building on the said land.
- (c) That the Defendants are hereby ordered to pull down dismantle and demolish any building erected on the land within two weeks hereof.
- (d) The question of mesne profits claimed by the Plaintiff in his Claim and of compensation to the Defendants in their Counter Claim be tried as a separate issue.
- 30 (e) That the costs of the hearing of the Preliminary issue to the Plaintiff to be taxed or agreed.

9. The substantial issue in this Appeal is whether the Appellants are stopped from raising anew their right to possession of the said lands having regard to an adjudication on the issue raised by the Appellants by a Court of Competent Jurisdiction.

40 10. The facts relating to this issue appear from the pleadings, evidence given and tendered at the trial of this issue and the Judgment of Mr. Justice Chambers and the Judgments in the Court of Appeal. So far as material they may be summarised as

RECORD

follows :-

- p.1. (a) The land, the subject matter of these appeals consists of 5 acres 1 rood and 6 perches being the land comprised in Certificate of Title registered at Volume 30 Folio 58 in the Register Book of Titles known as 15 Sunnyside Avenue in the parish of Clarendon.
- p.15. 11. On 1st December, 1960, the Learned Resident Magistrate for the parish of Clarendon made an Order vesting the said land in one Frederika Goode, the daughter of the then registered owner Annie Brown. 10
- p.15. 12. An Information No. 4479 of 1962 was laid by Frederika Walker agent for Frederika Goode under the Landlords and Tenants Law, Chapter 206 of the Laws of Jamaica, Section 54 which reads :-
- "When and so soon as the term or interest of the tenant of any house, land, or other corporeal hereditaments held by him at will or for any term not exceeding three years either without being liable to the payment of any rent, or at a rent not exceeding in the aggregate three pounds per month, shall have ended or shall have been duly determined by a legal notice to quit or otherwise and such tenant or (if such tenant do not actually occupy the premises, or only occupy a part thereof) any person by whom the same or any part thereof shall be then actually occupied, shall neglect or refuse to quit and deliver up possession of the premises, or of such part of the said premises or his agent to make application by complaint in writing on oath to a Justice for the parish in which such premises or any part thereof shall be situate in the Form set forth in the Fourth Schedule to this Law for a summons calling upon such tenant or person holding over to show cause why he should not deliver up possession of such premises and thereupon a summons may be issued by such Justice, returnable before a Court of summary Jurisdiction for the parish in which such premises or any part thereof shall situate, and the Court shall hear and
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RECORD

p.19. order for possession with warrant to issue not earlier than 21 days and not later than 28 days from the date of the Order, and found that the evidence of the first Appellant was a mere fictitious pretence of title.

p.42. 14. On the 29th day of January, 1963, the first Appellant filed a Writ of Summons against Frederika Walker claiming :-

- 1) A Declaration that the Plaintiff is entitled in fee simple to the parcel of land situate at Sunnyside, May Pen in the parish of Clarendon, consisting of 5 acres, now in the possession of the Plaintiff. 10
- 2) A Declaration that the Defendant has no right, title, estate or interest in the said land.
- 3) An Injunction restraining the Defendant, her servants and agents, from taking possession of the said land, or interfering with the possession of the Plaintiff in any way. 20
- 4) An Order setting aside the order of the Resident Magistrate's Court for the parish of Clarendon on the 10th day of October, 1962 that the Defendant is entitled to possession of the said land and also the Order of the said Court on the 10th day of January, 1963, for a Warrant of Possession to issue against the Plaintiff. 30
- 5) Damages
- 6) Costs
- 7) Further and/or other relief.

p.42. Whereupon the said Frederika Walker by Summons sought an Order that the Statement of Claim be struck out on the ground that the pleading disclosed no reasonable cause of action, was obviously frivolous and vexatious and sought to raise anew a question which had already been decided between the same parties by a Court of

10 determine the said complaint and on proof of
the personal service of such summons and of
the holding and of the end or other determina-
tion of the tenancy, with the time or manner
thereof, and where the title of the landlord
has accrued since the letting of the premises,
the right by which he claims the possession,
and upon proof of the neglect or refusal of
the defendant to quit and deliver up the
premises, it shall be lawful for the said
Court to issue a warrant to the Constables
and Peace Officers of the parish or place
within which the said premises or any part
thereof shall be situate, commanding them
within a period to be therein named, not less
than twenty-one nor more than thirty clear
days from the date of such warrant, to enter
(by force if needful) into the premises and
20 give possession of the same to such landlord
or agent, and may further order the defendant
to pay such sum by way of damages for his
neglect or refusal as he or they shall think
fit not exceeding the sum of three months'
rent of such premises together with any rent
then due and unpaid and the costs of the
proceedings, or may dismiss such complaint
with or without an order for costs to be paid
by such landlord or agent :

30 Provided always, that entry under such
warrant shall not be made on a Sunday or any
public holiday, or at any time except within
the hours of eight in the morning and five in
the afternoon :

40 Provided also, that nothing herein contained
shall be deemed to protect any person on whose
application and to whom any such warrant shall
be granted from any action which may be brought
against him by any such tenant or occupier, for
or in respect of such entry and taking possession
where such person had not at the time of
granting the same lawful right to the
possession of the premises:

Provided also, that nothing herein contained
shall affect any rights to which any person may
be entitled as outgoing tenant by the custom
of the country or otherwise."

13. The Learned Resident Magistrate granted an

Competent Jurisdiction.

15. Mr. Justice Fox in his Judgment dated the 29th day of October, 1963 held that the action was an attempt to re-try questions of fact which had already been conclusively decided by a Court of Competent Jurisdiction. p.17.
16. The Judgment and Order of Mr. Justice Fox was never reversed.
- 10 17. On the 12th day of August, 1969, the first Respondent was registered as the proprietor under the Registration of Titles Law. p.38.
18. The appeal was heard by the Court of Appeal of Jamaica on the 10th and 11th days of July, 1969 and Judgment delivered on the 11th day of July, 1969. The Court of Appeal by a majority dismissed the Appellants' Appeal. p.115.
19. The following issues were raised by the Appellants :-
- 20 (a) That the jurisdiction of a Learned Resident Magistrate to try the ejectment case was ousted as the question of title was in issue.
- (b) That whereas in the ejectment case the issue was whether the Appellants had purchased the land, the defence in this Action was one of adverse possession.
- 30 (c) That the Order of Mr. Justice Fox was not made after a consideration of the case on the merits as the Appellants' case in Suit No. Ell of 1963 was based on title by adverse possession.
20. Mr. Justice Edun (dissenting) was of the opinion that :-
- (a) it was open to the Court to examine the evidence taken by the Learned Resident Magistrate in the ejectment case to determine whether there was a bona fide dispute of title raised.
- (b) It was not correct that the Court was

RECORD

entitled to look at the facts and reasons for judgment not to decide if the findings (of fact) were correct but to see if they established the same issues raised in the action.

(c) The Learned Resident Magistrate was wrong to proceed to regard the evidence of the Complainant and his witness as truthful and to regard the evidence of the Defendant as a mere fictitious pretence of title. 10

(d) By adjudicating as he did where it appeared on a reasonable assessment of the evidence that there was a bona fide dispute as to title, the Magistrate in a collateral issue was giving himself jurisdiction.

(e) The Appellants had a lawful right to bring Suit No. E.11 of 1963 for a declaration that they were entitled to the fee simple of the land and that their Suit was neither frivolous nor vexatious nor an abuse of the process of the Court, and that the decision to strike out the Suit was wrong. 20

21. The Respondents respectfully submit that :-

(a) it was not open to the Court in this Appeal to examine the evidence in order to decide whether or not the Learned Resident Magistrate was wrong in his findings of fact. 30

(b) The Learned Resident Magistrate was empowered by the Landlords and Tenants Law, aforementioned to hear and determine whether the Complainant, Frederika Walker was entitled to have a Warrant of Possession issued against the first Defendant/Appellant.

(c) That the issue of whether the dispute as to title was bona fide was essentially one for the Learned Resident Magistrate to determine. 40
See Howarth & Suthcliffe 1895 2 Q.B. 238 at p. 364.

- (d) That the Court of Appeal could not in Appeal No. 36 of 1972 substitute its own finding of fact for those facts found by the Learned Resident Magistrate.
- (e) That there was no appeal against the findings of fact or the order of the Learned Resident Magistrate.
- 10 (f) Alternatively, if Mr. Justice Edun is correct that the action in Suit No. E.11 of 1963 was an appropriate way of challenging the order of the Learned Resident Magistrate, and that the decision of Mr. Justice Fox to strike out the action was wrong, the adjudication by the Learned Resident Magistrate still remained effective as the decision of Mr. Justice Fox was never upset by appeal.
- 20 (g) That the defence of adverse possession was not raised before the Learned Resident Magistrate although the Appellants sought to raise this issue in Suit No.E.11 of 1963 and in the defence to the Action, and shows insincerity.
- (h) That in any event the defence of adverse possession was not open to the Appellants in this Action as the Action was filed on the 23rd day of March, 1972, and twelve years had not elapsed since the trial before the Learned Resident Magistrate
- 30 (i) That there could be no certainty in commercial transactions if judgments of a Court could be upset several years after they were delivered without resort to the proper procedures for appeal.
- (j) That the judgments of the majority of the Court of Appeal were correct and the cases cited therein accurately reflect the position in law.

APPEAL 21 OF 1974

p.129.

- 40 22. The Action in respect of this Appeal was brought by the Appellants as Plaintiff in the Supreme Court of Judicature of Jamaica against both Respondents as

RECORD

Defendants claiming damages for wrongful entry upon the said land, the subject matter of the Action in Appeal 36 of 1972 and demolishing the Plaintiff's house and removing the Plaintiff's goods.

23. The Respondents successfully applied for the striking out of the Statement of Claim on the grounds that the action was frivolous and vexatious.

p.84.

24. This Action arose out of the execution of the Judgment and Order of Mr. Justice Chambers in the action resulting in Appeal 36 of 1972.

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25. The Respondents respectfully submit :-

(a) that there being no Stay of Execution in respect of the decision of Mr. Justice Chambers the first Appellant was entitled to the fruits of the judgment.

(b) That it was frivolous, vexatious and an abuse of the process of the Court to have filed an Action in Trespass when the first Respondent had a judgment in its favour giving it the right to possession.

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W.K. CHIN SEE

IN THE ~~JUDICIAL COMMITTEE OF THE~~
PRIVY COUNCIL

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RECEIVED

4 JAN 1977

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